No. 2858

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GIN DOCK SUE,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLEE

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. United States Attorney,

Attorneys for Appellee.

Filed this.....day of March, 1917.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

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STATEMENT OF THE CASE.

The Government feels that little more is required of it to satisfy this Court that the order of deportation was correct than an orderly statement of the case.

The following facts are admitted by stipulation of counsel (Trans. pp. 50 to 52).

> "It is hereby stipulated and agreed by and between the respective parties in the above-entitled cause that the ultimate facts as shown by the record of the Commissioner of Immigration at the port of San Francisco in said cause are as follows:
>
> That on July 9, 1907, defendant departed from the United States for China;

That on July 14, 1908, the defendant returned to the United States from China, applying for admission under the name of YEUNG LUNG SOO, at the port of San Francisco, as a returning Chinese merchant of the firm of Dan Saw Hong Company, 306 Marchessault Street, Los Angeles, California;

That on August 26, 1908, defendant was denied admission into the United States by the Commissioner of Immigration for the port of San Francisco;

That on October 1, 1908, defendant's appeal from the excluding decision of the said Commissioner of Immigration was dismissed by the Secretary of Labor.

That on November 4, 1908, defendant's attorneys applied to the said Commissioner of Immigration for a reopening of the case, certain affidavits being filed in support of said application;

That on November 28, 1908, the defendant escaped from the custody of the Pacific Mail Steamship Company, at San Francisco, California, which Company had brought the defendant to the port of San Francisco, California, from China, on July 14, 1908, and which Company had held him in custody awaiting the determination of his application for admission into the United States.

That pursuant to the said application for a reopening of the case made by defendant's attorneys on November 4, 1908, said Commissioner of Immigration referred the matter of said application for reopening to the Immigration offi-

cials at Los Angeles, California, for investigation;

That on December 3, 1908, the said Commissioner of Immigration received a report from the said Immigration officials at Los Angeles, California, upon their investigation made pursuant to the said application for reopening;

That on December 8, 1908, the said Commissioner of Immigration made the following entry in the record of the matter of the said application of the defendant for admission into the United States;

'San Francisco, Dec. 8, 1908.
This man escaped from the Pacific Mail Steamship Company, and is a fugitive—application for a rehearing denied.
H. H. NORTH,
Commissioner.'

And it is further stipulated and agreed by and between the respective parties in the above-entitled cause and their attorneys that the facts as herein set out are the ultimate facts as shown by said record of the Commissioner of Immigration, Port of San Francisco, and are to be considered by the United States Circuit Court of Appeals on the appeal taken herein.

JNO. W. PRESTON,
U. S. Attorney.

CASPER A. ORNBAUN,
Asst. U. S. Attorney.

GEO. A. McGOWAN,
Attorney for Gin Dock Sue."

The appellant was arrested on January 20, 1913, under a warrant issued by the United States Commissioner January 18, 1913, and has ever since been held by virtue of that warrant (pp. 5 and 6 Trans.).

At the hearing before the United States Commissioner, on March 27, 1914, K. Ow Yang testified as follows: (pp. 15 to 17 and 23-24 Trans.)

TESTIMONY OF K. OW YANG, FOR DEFENDANT.

W. OW YANG, called for the defendant, sworn.

Mr. McGowan.—Q. You are the Chinese Consul general for the port and district of San Francisco?

A. Yes.

Q. Do you know the defendant in this matter, Chin Dock Sue?

A. I know him.

Q. What is his occupation?

A. He is secretary of the Ning Yung Association, and attached to the Chinese Consulate.

Q. He is a Chinese official?

A. Yes.

Q. How long has he been such?

A. I know him since he took it this last November.

The Commissioner.—Q. He is now attached to the consular service, is he?

A. Yes.

CROSS-EXAMINATION.

Mr. Hettman.—Q. By whom was he appointed as such official?

A. He was selected by the Ning Yung Association.

Q. Was he appointed in any way through the Chinese Government, itself?

A. Well, we have an advisory board of the Chinese consul and all the members of the different association assist our Chinese Consul in the work.

The Commissioner.—His appoinment comes through what, some association here?

A. Yes.

Mr. Hettman.—Q. What is his official capacity, what is his title?

A. He is secretary of the Ning Yung Association, and he does work for the Chinese Consul at any time we have conferences of any kind.

Q. Did he get any papers or any certificate from the Chinese Government stating that he was a Chinese official?

A. Why, every time a new man is selected to come here, he gets his passport from the Minister in Washington to get in here.

Mr. McGowan.—Q. These men are all landed as Chinese officials at this port.

A. Yes.

Q. Right from the steamer?

A. Yes.

Q. Without any requirements being met as to the immigration law?

A. Yes, they are always taken as officials.

Mr. Hettman.—Q. His appointment was since November, 1913, is that it?

A. Yes.

Q. In November, 1913.

A. This last year.

Q. He never held any such official position prior to that time, to your knowledge?

A. No.

Q. Should this man have a certificate of any sort from the Chinese Government showing that he is such an official?

A. All the presidents of such association come from China, but the secretary of such association, they usually pick up a man who speaks English, for that, one who knows English; a man of that kind is generally selected in this country, because we want a man who knows English. The presidents always come from China.

Q. He has no credentials or anything from the Chinese Government?

A. No; but of course, in case he should come from China, the Chinese Government, the Minister in Washington, would issue him a passport.

Q. Then as I understand it, he is secretary for an association in San Francisco, who may do

some work for the Chinese Consul if he sees fit to have any work done?

A. Yes.

Mr. McGowan.—He is a member of the advisory board of the consul?

A. Yes."

"TESTIMONY OF K. OW YANG, FOR DEFENDANT (RECALLED).

K. OW YANG, recalled for defendant.

Mr. McGowan.—Q. I show you a certificate and ask you what that is?

A. This is a passport given by the minister to one of the presidents of the Ning Yung Association to come here from China.

Q. That is issued by the Chinese Minister at Washington?

A. At Washington, yes.

The Commissioner.—That does not relate to this man.

Mr. McGowan.—That is Lee Yung Bing?

A. Yes.

The Commissioner.—Has he been a witness here?

Mr. McGowan.—No.

Q. He is at the present time the President of the Ning Yung Association?

A. Yes.

Q. Now, then, if this defendant were coming from China to be landed here as secretary of the Ning Yung Company, he would have a certificate issued to him just like that?

A. Yes.

Q. Describing him as the secretary, instead of the president?

A. Yes.

Q. Where the president of one of these companies is appointed here, does not come from China, does he have one of these issued to him?

A. No.

Mr. Hettman.—Did the Minister of China appoint the defendant here, as secretary of this association?

A. No.

Q. All this refers to is some other man whose passport you have here, signed by the minister of China, for a man by the name of Lee Yung Bing?

A. Yes.

Q. Has nothing to do with this defendant, here?

A. No.

Mr. McGowan.—Q. How are the presidents of this company selected?

A. They are selected by—

Mr. Hettman.—We object to this.

The Commissioner.—It is not very relevant,

but I want to hear all that bears upon the question.

Q. How are the presidents selected?

A. They are selected by the people of the association.

Q. And then the Chinese minister simply confirms the person that has been selected?

A. Yes, sanctions his selection."

Also before the Commissioner on said March 27, 1914, two white men, Newton G. Cohn and L. C. Tamm, (pp. 18 to 22 Trans.) and a Chinaman, Wong Lung Moon (p. 22 Trans.), testified in substance that this appellant, Gin Dock Sue, had been a merchant, member of the firm of Chung Lung Jan Company, 827 Grant Avenue, San Francisco, California, for about two years last past.

The appellant himself testified before the United States Commissioner (pp. 27 and 28 and 30 to 33 Trans.) upon other matters that are considered by the government as immaterial to this case, and produced a certificate of residence that he had been registered under the Chinese Exclusion Act.

The Commissioner then rendered the following opinion (pp. 8 to 10 Trans.), and ordered the appellant deported (pp. 11 to 13 Trans.):

"From the facts in this case it appears that the defendant Chin Dock, alias, etc., is a Chinese person and that he came to this port on board the steamship 'Korea', July 14, 1908, and after

due examination by the proper officers was denied a landing, thereupon and pending the return of said defendant to the port whence he came, said defendant escaped from detention.

It further appears from the evidence that said defendant is a merchant and has been such for the two years last past, and is also an officer in a local Chinese benevolent society, whose officers appear to be entitled to certain privileges as such in passing to and from the United States.

It is contended by the Government that the defendant is illegally in the United States and subject to deportation under the Chinese exclusion laws.

I am of the opinion that a Chinese person must submit to the exclusion laws when coming into the United States, and if he evades the law and his entry is illegal, he is subject to deportation. It is the province of the Department having the determination of the entry to first pass upon his right to come to the United States. Although he may have gained a status subsequent to his illegal entry that would entitle him to be and remain here, this cannot cure the illegal entry and his violation of the exclusion laws, subject him to the penalty of deportation. As was said in the case of *Ex Parte Li Dick,* 174 Fed. 674: 'Legally he is here in violation of law, and, so far as he is concerned or can be heard to say, he is found unlawfully here. He has no right to be here as he did not comply with the statutes and rules governing the entry of domiciled Chinese merchants, and until he has done that at the proper time and place his right to be here as such

merchant is suspended. He cannot now be allowed to plead or assert that right as a bar to deportation, even if he might assert it at the proper time and place and in a proper manner. x x x He did not have the right to come and go freely, and his case is not like that of a citizen of the United States arrested for having come in illegally on the supposition he was an alien.'

I do not think the defendant is an official of the Government of China within the meaning of the statutes so as to entitle him to absolute exemption from the provisions of the exclusion laws.

I am also of opinion that section 20 of the General Immigration Laws and Regulations, which fixes a limit of time for deportation, does not apply in this case.

FRANCIS KRULL,
United States Commissioner, Northern District of California, at San Francisco."

At the hearing before the District Court there was introduced in evidence a paper, admittedly not issued to, or the property of the defendant, which reads as follows: (p. 46 Trans.)

"(Copy of Certificate:)

'LEGATION OF CHINA, WASHINGTON.

No. 216.

To all to whom these presents shall come, Greeting:

Whereas Mr. Lee Yew Bong is about to proceed from his home in China to the port of San

Francisco, California, accompanied by his body servant, Lee Chock Yuen, for the purpose of filling the office of President of the Ning Yang Association, one of the Chinese Benevolent Associations, and Ex-Officio member of the Advisory Board of the Chinese Consulate General at the said port.

These are, therefore, to request all Customs and Immigration Officers whom it may concern, to permit the said Lee Yew Bong with his body-servant to pass freely and safely without let or hinderance, and, in case of need, to give him all friendly aid and protection.

Given under my hand and the seal of the Legation at the City of Washington, June 20, 1913.

CHANG YIN TANG,
The Minister of China.

All father
13486/6-5
S. F. 6-22-14

13794

and 10-14' ''

The appellant's certificate of residence is set forth in the transcript (pp. 66 and 67), as is an application made by the appellant in 1903 for a laborer's return certificate (pp. 68 to 70 Trans.). In the Government's opinion, neither this certificate or the application are material in the case.

The opinion of the District Court affirming the Commissioner's order of deportation is as follows: (pp. 48 and 49 Trans.)

> In July, 1908, Gin Dock Sue applied for admission at the port of San Francisco as a returning Chinese merchant. On August 26th, 1908, his application to land was denied, and on appeal the order denying his application was affirmed. He then applied for a rehearing, but on November 26th, 1908, and before such application was heard, he escaped from the detention quarters and has ever since been within the United States. On December 8th, 1908, his application for a rehearing was denied by the following order:
>
> 'San Francisco, Dec. 8, 1908.
>
> This man escaped from Pacific Mail Steamship dock and is a fugitive. Application for rehearing denied.'
>
> Having been later found in this country he was arrested and after a hearing before the Commissioner was ordered deported. From the order of deportation an appeal was taken to this Court. It is urged here, as it was urged before the Commissioner, that respondent is a merchant, and that he is an attache of the Chinese Consular office in San Francisco. But whatever status he may have as an attache of the Consulate has been acquired since his escape from the Immigration officers in 1908. I do not think that that this method of entry into the country can be cured by thereafter becoming attached to a consular or other office. As to his mercantile

status, if it existed before his escape, that was a matter to be established regularly before the immigration officers at the time that he applied to enter. If their proceedings were unfair in the investigation of that question he might then have appealed to the courts. Instead of doing so he chose to enter the country by escaping from custody. If the status was acquired after such escape, he can no more be heard to urge it here as giving him a right to remain in this country than he can be heard to urge his connection with the Consulate. The law will not put such a premium upon surreptitious entries into the country as to permit one so entering to acquire a right to remain. The order of deportation is therefore affirmed.

M. T. DOOLING,
Judge."

October 8th, 1915.

The questions that the Government considers involved in this case are:

FIRST: Have the Courts, in the absence of unfair hearing or abuse of discretion on the part of the Immigration officials, authority to admit into this country under the Chinese exclusion laws a Chinese applicant for admission who has been duly denied landing and ordered deported by such officials, because of the escape of the Chinaman from their custody pending deportation?

SECOND: Is a Chinaman who came into the United States in violation of law—especially under the circumstances of this case—subject to depor-

tation by a United States Commissioner or Court under the Chinese exclusion laws by reason of his having subsequently taken up the occupation of one of the exempt or privileged classes, to wit: that of a merchant in this country?

THIRD: Assuming that while in this country as a result of such unlawful entry, said Chinaman, after his arrest under a United States Commissioner's warrant as being in the United States in violation of the Chinese exclusion laws, becomes an official of the Chinese Government in the capacity of an attache to a Chinese Consul General, is such Chinaman subject to deportation by a United States Commissioner or Court under the Chinese exclusion laws?

FOURTH: Does the record show that this appellant is in fact an official of the Chinese Government within the meaning of the Chinese Exclusion laws?

FIRST

Have the Courts, in the absence of unfair hearing or abuse of discretion on the part of the Immigration Officials, authority to admit into this country under the Chinese Exclusion Laws a Chinese applicant for admission who has been duly denied landing and ordered deported by such officials because of the escape of the Chinaman from their custody pending deportation?

It may well be contended that this Chinese person when recognized by the Immigration officials after his arrest under a United States Commissioner's warrant in 1913, and when he was again in their custody, should have been deported under the order of 1908 based upon the denial of his application for admission as a merchant; in other words, that such order of deportation remained in abeyance from the time of his escape in 1908 until his return to the custody of the Immigration officials in 1913. When the Immigration authorities had the appellant in their custody in 1913, and were about to deport him under the order of 1908, a petition for a writ of habeas corpus was filed in the District Court in his behalf. Before a hearing was had thereon, however, that Court granted a motion for his release on bail pending the habeas corpus proceeding, expressing the opinion that the appellant, by reason of his residence in this country for five years last past, was entitled to a trial before a United States Commissioner and to bail. Out of deference to this opinion of the Court, the Immigration officials relinquished the custody of the appellant without awaiting a hearing on the merits of the petition, and the deportation case before the United States Commissioner, which is now here on appeal, proceeded.

It is submitted that for this Court to order the discharge of the appellant would be tantamount to its landing in the United States a Chinese applicant for admission who is under a final order of depor-

tation made by the proper Immigration authorities, without the requisite finding, either that the hearing given by those authorities was unfair, or that they abused their discretion. It is, of course, unnecessary to support by the citation of authorities the fundamental principle that the Courts absolutely are without authority to interfere with the carrying out of such orders made by executive officers in the absence of unfairness or abuse of discretion by such officers.

SECOND

> Is a Chinaman who came into the United States in violation of law—especially under the circumstances of this case—subject to deportation by a United States Commissioner or Court under the Chinese Exclusion Laws by reason of his having subsequently taken up the occupation of one of the exempt or privileged classes, to wit: That of a merchant in this country?

This question was clearly and positively settled by this Court in *United States* vs. *Chu Chee, et al,* 93 Fed. 797. On page 804 is the following:

> "But it is contended on the part of the defendants that the status of Chinese aliens domiciled in the United States must be determined according to their status at the time of arrest and not at the time of entry, and that, upon being arrested, it was competent for them to show by affirmative proof that they were stu-

> dents engaged in acquiring an education in our schools, and, being so engaged, they were not members of the prohibited class, and not subject to deportation. When, however, that domicile has been acquired contrary to and in violation of the laws of the United States, and when, as here, it is only through an unlawful entry into the United States that the Chinese persons secure a residence in this country, they cannot purge themselves of their offense by assuming the occupation of members of the privileged class, and establish their right to remain by proof of that character. The right of the defendants to land in this country on the claim of being students was dependent upon their producing to the collector of customs, at the port of their arrival, the certificate required by section 6 of the act of 1882, as amended; and to entitle them to remain here they must thereafter produce the same to the proper authorities whenever lawfully demanded."

The case now under consideration, if anything, is stronger for the Government than was that case because there Chu Chee, et al, had been regularly, though improperly landed by the Immigration authorities; while here, the appellant has never been landed by such officials, but, on the contrary, was ordered deported by them and escaped from custody before the order of deportation was executed. The appellant contends for an interpretation of the decision in that case quite different from that of the Government; but this Court knows best what it decided.

The following cases are also cited as involving the principle here contended for by the Government:

Mar Bing Juey vs. *United States,* 97 Fed. 576,

Ex Parte Li Dick, 174 Fed. 674,

Chin Fong vs. *Backus,* 213 Fed. 288 and 241 U. S. 1.

The Court will observe that none of the cases relied upon in the appellant's brief contain the question of unlawful entry as in the case at bar.

The argument of the appellant's attorney that the United States Commissioner was without authority to order this Chinaman's deportation because more than three years had elapsed since his unlawful entry, is to say the least startling. United States Commissioners and Courts have always had the power without limit as to time to order Chinese deported under the Chinese exclusion laws. This power was exclusively vested in them up until the passage of the Immigration Act of February 20, 1907, Section 21 of which vested the Secretary of Labor with concurrent power to expel Chinese in the country in violation of the Chinese exclusion laws but limited that authority given the Secretary of Labor to cases in which the Chinaman had entered the country within three years. Can it be said that because Congress limited as to time the concurrent jurisdiction of the Secretary of Labor, that it also impliedly limited as to time the jurisdiction

of the Commissioners and Courts? That this was never intended by Congress is especially apparent from the following provision of Section 43 of the said Immigration Act of February 20, 1907, as follows:

> "Provided that this Act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent. * * *."

THIRD.

> Assuming that while in this country as a result of such unlawful entry, said Chinaman, after his arrest under a United States Commissioner's warrant as being in the United States in violation of the Chinese Exclusion Laws, becomes an official of the Chinese Government in the capacity of an Attache to a Chinese Consul General, is such Chinaman subject to deportation by a United States Commissioner or Court under the Chinese Exclusion Laws?

It is submitted that a Chinese without any credentials whatsoever from the Chinese Government, or even from the Chinese Minister in this country, is in no better position to resist deportation because of his unlawful entry, he having secured that position after his arrest upon a charge of being in the United States in violation of law because of his unlawful entry, than would be a Chinaman who had followed the calling of a merchant after his unlaw-

ful entry. The claim of such a Chinaman to the status of an official is at least questionable.

FOURTH.

> Does the record show that this appellant is in fact an official of the Chinese Government within the meaning of the Chinese exclusion laws?

The evidence upon which the question of official status is based is the testimony of Mr. K. Ow Yang, former Chinese Consul-General at San Francisco, hereinbefore set forth; and also the passport issued by the Chinese Minister at Washington to Mr. Lee Yew Bong when the latter came to the United States from China as the President of the Ning Young Association, one of the Chinese benevolent societies comprising what is commonly known as the six companies. The Ning Young Association is the organization of which the appellant claims to be secretary. Appellant's counsel has injected facts into his brief that do not appear in the evidence, and therefore it is not impossible that the government may take the same liberty.

It seems scarcely necessary to do more than invite the court to read the evidence just indicated to convince it that the claim that this appellant is an official of the Chinese Government in any proper sense is ridiculous. In the first place, even the presidents of these benevolent associations are not appointed by the Chinese Government. When they

come from China they are simply possessed of a passport such as the humblest private citizens of nations are provided when they go abroad. It is safe to say that neither the official records of the Government in China nor of our government make the slightest mention, either of the president of the Ning Young Association or of this appellant, except perhaps of the former in connection with his having been issued, like many other private citizens, a passport. If there were any official record that would have shown that this appellant was known in any sense as an official of the Chinese Government, a copy of that record would certainly have been produced. Again, it is significant that that government has not concerned itself in the least over this alleged indignity suffered by the appellant. It is true that the Consul-General has appeared and told how the appellant was the secretary of a local Chinese benevolent association and was elected such solely by the members of that body; how he and the members of the different associations assist him (Consul-General) in his work; and how "he does work for the Chinese Consul at any time we have conferences of any kind." It is the duty of the Chinese Consul-General to assist even the humblest of his countrymen here. He frequently interests himself in behalf of Chinese subjects of all classes whose cases are before the Immigration officials.

The situation is analogous to this: Suppose within the District of an American Consul in a

foreign country there should be American residents from various sections of this country; suppose the residents from each section should form an association to look after the interests of its members; even to the extent of settling difficulties that may arise between individual members; suppose that the American Consul, a part of whose duty it would be to interest himself in the welfare of all Americans in his district, should by custom meet with the officers of these associations to consider with them matters relating to their welfare, and that they should be known as his advisory board. Is it conceivable that these members of this advisory board would be officials of the United States Government?

Great stress is laid upon the fact that the *presidents* of these benevolent associations on coming from China have been landed as officials by the Immigration authorities. The question whether they are really officials within the meaning of the law has on occasions been seriously questioned and considered in the Department of Labor, and, without deciding the question, the conclusion has been reached that it would be good policy, considering the comity between the nations and pleasant commercial relations, to let the custom stand and give the law even a broader interpretation than its terms justify.

In considering this point, sight should not be lost of the fact that this deportation proceeding was instituted against the appellant in January, 1913,

and that he did not acquire his so-called official status until November, 1913.

Respectfully submitted,

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CASPER A. ORNBAUN,
Asst. U. S. Attorney.
Attorneys for Appellee.